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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

NORTH CAROLINA UTILITIES COMMISSION,
Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite the explicit statutory language of Section 4 of the Natural Gas Act placing the burden of proof on the rate-increase applicant to show that its proposed increased rate is just and reasonable, the court of appeals properly held (a) that no burden of proof rested on a pipeline applicant as to certain arbitrarily fixed zone differentials contained in its increased rate because those differentials, though never shown to be just and reasonable, had previously been in effect pursuant to a "without prejudice" settlement, and (b) that the Commission's decision requiring zone differentials to be based on the relative distance to each zone, though supported by substantial evidence of record and Commission precedent, should be set aside because the Commission had not, in the court's view, expressly made a *negative* finding that the arbitrary differentials were unjust and unreasonable.

2. Whether, having found that the Commission's order should be set aside for failure to make the negative finding, the court of appeals was free to reinstate the result rejected by the Commission without remanding the proceeding to the Commission to afford it an opportunity to make the finding newly required by the court's opinion.*

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* The parties to the proceeding in the court below were the Federal Energy Regulatory Commission, Atlanta Gas Light Company, Brooklyn Union Gas Company, Carolina Pipeline Company, Columbia Gas Transmission Corporation, Commonwealth Gas Pipeline Corporation, Consolidated Edison Company of New York, Elizabethtown Gas Company, Long Island Lighting Company, National Fuel Gas Supply Corporation, North Carolina Natural Gas Corporation, North Carolina Utilities Commission, Philadelphia Electric Company, Philadelphia Gas Works, Piedmont Natural Gas Company, Public Service Commission of the State of New York, Public Service Company of North Carolina, Public Service Electric and Gas Company, South Jersey Gas Company, Transcontinental Gas Pipe Line Corporation, and Washington Gas Light Company.

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The North Carolina Utilities Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (FERC Pet. App. A[1]) is reported at 642 F.2d 1335. The opinion of the Federal Energy Regulatory Commission (Opinion No. 59,

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[1] Copies of the opinions and related materials required by Rule 21.1(k) appear in an Appendix to the Petition for a Writ of Certiorari being filed contemporaneously by the Federal Energy Regulatory Commission in No. 80———. References identified as "FERC Pet." are to that pleading.

reprinted at FERC Pet. App. F) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1980 (FERC Pet. App. B), and petitions for rehearing were denied on December 18, 1980 (FERC Pet. Apps. C, D, E). By orders issued March 13, March 18, and April 16, 1981, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, are set out in FERC Pet. App. 1.

STATEMENT OF THE CASE

Transcontinental Gas Pipe Line Corporation (Transco) operates an interstate natural gas pipeline running from its sources of supply in Texas and Louisiana to its northern terminus in the New York metropolitan area. Its service territory is divided into three rate zones: Zone 1, consisting of Mississippi, Alabama, and Georgia; Zone 2, consisting of South Carolina, North Carolina, and Virginia; and Zone 3, consisting of Maryland, Pennsylvania, New Jersey, and New York. Although Transco's rates were, from the commencement of service in 1950, subject to federal regulation under Sections 4 and 5 of the Natural Gas Act, the propriety of the zone differentials on its system had not been decided by the Commission [2] until the proceeding below; rather Transco's rate increase fil-

[2] References to the "Commission" are to the Federal Power Commission prior to October 31, 1977, and to the Federal Energy Regulatory Commission thereafter.

ings over the years were resolved via settlement, which avoided the necessity for decision on the merits.

Thus, in 1962, the Commission approved a rate settlement agreed to by Transco and its customers calling for rates of 33.05¢ per Mcf in Zone 1, 35.85¢ in Zone 2, and 39.45¢ in Zone 3, *Transcontinental Gas Pipe Line Corp.*, 27 FPC 187. Transco's rates remained relatively constant over the next ten years. In the early 1970's, however, Transco filed for several substantial rate increases; in each case, the rates were settled, without hearing and decision on the merits, utilizing the same fixed differentials contained in the 1962 settlement (i.e., 2.8¢ per Mcf between Zones 1 and 2, and 3.6¢ per Mcf between Zones 2 and 3).

In July 1976, Transco filed the rate increase at issue here, seeking increased revenues of $81,300,000 per year. The proposed increased rates—$1.044 per Mcf for Zone 1, $1.072 per Mcf for Zone 2, and $1.108 per Mcf for Zone 3—were approximately three times the levels in the 1962 settlement, but incorporated the same 2.8¢ and 3.6¢ zone rate differentials. The Commission, exercising its powers under Section 4 of the Act, suspended the effective date of the increased rates until February 1, 1977, and provided for hearings on the propriety of the increased rates. Although most of the issues in the case were resolved via settlement, the issue of proper zone allocations proceeded to hearing.[3] At the hearing, both the FERC Staff and the Zone 2 customers presented evidence in support of basing the zone differentials on the actual differences in the cost of transporting gas to each zone (R. 117-22, 171-84, 255-65, 680-87[4]).

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[3] In the meantime, in accord with the statutory scheme, the increased rates had become effective, subject to refund.

[4] References to "R" citations are to the record before the Commission, as certified to the court of appeals.

On August 6, 1979, the Commission issued its Opinion No. 59 (FERC Pet. App. F), holding that on the Transco system, as on similar long-line pipelines, zone differentials should reflect the miles of haul to each zone (the Mcf-mile method). The Commission expressly found that no adequate basis had been shown to justify continuation of the 1962 settlement differentials—an arbitrary set of numbers not based on any discernible methodology (FERC Pet. App. F 38a-50a).

The court of appeals reversed, holding that the burden of proving the 1962 zone rate differentials unjust and unreasonable was on the Commission; that the Commission failed to discharge that burden; and that, accordingly, the Commission's order should be vacated and the 1962 differentials continued in effect until the Commission in some future proceeding could prove that those differentials were unjust and unreasonable. The court specifically held that the Commission's finding—that the differences in rates among zones should be based on miles of haul and that "no adequate or proper basis had been shown to justify the continued application of previously negotiated settlement rate differentials"—did not amount to a finding that the prior zone differentials were unjust and unreasonable.

REASONS FOR GRANTING THE WRIT

Not only is the decision below clearly erroneous—contrary to both the explicit statutory language and the long-established practice thereunder, and in sharp conflict with the governing precedents—but it will seriously interfere with the Commission's administration of the Natural Gas Act in two important respects: It will severely limit the Commission's ability to eliminate existing rate discrimination, condemned as illegal under the Act; and it will furnish a powerful disincentive to settlement of future rate cases.

I.

Section 4(e) of the Natural Gas Act provides:

> "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company . . . ."

The court below, purportedly *relying* on the statutory language, redefines the statute's "*increased* rate" to mean "increase in rate". The two are quite different, and the statute deliberately chose "increased rate".[5] It is noteworthy that the court of appeals failed to address the reasons for the statutory burden of proof. Obviously, the rate applicant has in its possession the information which would indicate not only whether the "novel portions"[6] of its increase are justified but also whether the "unchanged parts",[7] even if once justifiable, remain so under present conditions; moreover, since it is the rate applicant which, under Section 4(d), has the right to decide which parts of its existing rate it will change and which it will permit to remain, it is appropriate for the applicant to justify that choice, see 45 Cong. Rec. 7136 (1910).[8]

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[5] The court of appeals appears to have misapprehended the manner in which rate increases are filed—the regulated company does not file a separate, incremental "increase" on top of its underlying rate, but rather files an "increased rate" which replaces and supersedes the prior rate.

[6] Court of appeals opinion, FERC Pet. App. A 15a.

[7] *Ibid.*

[8] The burden of proof provision in Section 4(e) derives from a corresponding provision in the Interstate Commerce Act. In explaining why the burden of proof should be on the rate applicants, the sponsor of the bill stated:

> "All the information, or practically all of it, is in their hands. It is but equitable to compel them to lay before the commission the conditions and circumstances which they believe warrant an increase in their rates."

It is both ironic and significant that although the court of appeals hinged its result on the unfair burden that would otherwise be placed on the pipeline applicant to justify the "changed parts" of its increased rates,[9] the pipeline here did *not* challenge either the Commission's procedure or the Commission's result.

The pipeline's acquiescence in the Commission's approach is not surprising. The standards governing rates are established by Sections 4(a) and 4(b): 4(a) requires that all rates shall be just and reasonable, and declares unlawful any rate that is not just and reasonable; 4(b) prohibits undue preference, undue prejudice, and unreasonable difference in rates. This is the burden of proof that the applicant must meet under Section 4(e), and the Commission's regulations governing rate increase filings require the rate applicant to demonstrate both that its proposed increased rates do not produce excessive overall revenues, see 18 CFR § 154.63(f), Statement A, *and* that the proposed increased rates properly reflect the cost of serving each rate zone, *id.*, Statements J, J-2.

The facts of this case demonstrate the profound lack of logic in the court of appeals' effort to shield the "unchanged portion" of the increased rate from the Section 4 burden of proof. The 1962 differentials of 2.8¢ and 3.6¢ were adopted in connection with rates in the 35¢ range, and at the time of their adoption represented 7.8% and 9.1% of the next higher zone rate. Applying the 1962 differentials in 1977—to proposed rates in the $1.05 range—the 1962 unit differentials amount to only 2.6% and 3.2% of the next higher zone rate. Given the passage of 15 years, the tripling of the cost of gas, and the general level of inflation, there is certainly no logical basis for assuming that the unit differentials that were appropriate and nondiscriminatory in 1962 would still be

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[9] See court of appeals opinion, FERC Pet. App. A 15a.

appropriate and nondiscriminatory in 1977. Yet, the decision below, creating presumptions where neither Congress nor the agency found them appropriate, would force the Commission to exalt the *status quo* regardless of changed conditions that require, at the very least, new justification for retention of the old result; such judicial interference with agency flexibility to meet changed circumstances clearly was not contemplated by the judicial review section of the Natural Gas Act.

II.

The holding of the court below is in conflict with the decisions of this Court both as to substance and as to procedure.

Almost 20 years ago, in *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), this Court thoroughly disposed of the "heavy burden on the pipeline" argument resurrected by the court below. In addressing the issues arising from Commission correction, in a Section 4 proceeding, of rate discrimination resulting from zone allocations, a unanimous Court held, 371 U.S. at 152-53:

> "[A]n analysis of the policy of the Act clearly indicates that a natural gas company initiating an increase in rates under § 4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being 'just and reasonable.' . . . In this latter respect a rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter. Such situations

> are entirely consistent with the policy of the Act and, we are told, occur with frequency. The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."

The Court specifically ruled that if discrimination were later found in the allocation of costs among zones under "the old and undecided zone rate structure under attack as discriminatory," 371 U.S. at 153, "the Commission has the power to . . . order" both "decreased rates and resultant refunds," 371 U.S. at 154—clearly a power available only under Section 4. Yet, the court below held that the Commission erred in treating the zone allocation issue here under Section 4 rather than Section 5.

Again, in the landmark *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court canvassed both the range of, and the limitations on, the Commission's powers under the Natural Gas Act, noting, 390 U.S. at 827 (emphasis supplied):

> "A rate found to be unjust and reasonable is declared by § 4(a) to be unlawful; *if the rate has been the subject of a rate schedule modification under § 4(d)*, the Commission is empowered by § 4(e) to order its refund. We can see no warrant, either in the Act or in the terms of the Commission's orders, now to impose any additional limitations upon the Commission's authority; we hold that the Commission's discretion is not constricted in the fashion described by the Court of Appeals."

Not only did the court of appeals err on the merits in holding that the Commission was required to proceed under Section 5, but it erred in its remedy. Rather than remanding the case to afford the Commission an oppor-

tunity to make the finding newly required by its decision, the court of appeals simply vacated the Commission's opinion and terminated the case, in effect mandating continued use for the indefinite future of the stale 1962 differentials found unwarranted by the Commission, with the only hope for remedy a newly initiated proceeding under Section 5. The inadequacy of the Section 5 remedy has long been noted by this Court, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 at 389 (1959); *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 at 642-45 (1972). It follows that even were the court of appeals correct on the merits, its refusal to remand was error, see *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978).

III.

The decision of the court below will, if left standing, seriously interfere with the Commission's administration of the Natural Gas Act in two separate areas.

First, the decision below will deal a fatal blow to the Commission's primary—and only effective—means of enforcing the antidiscrimination mandate of Section 4(b). Because each of the major natural gas pipelines files for increased rates under Section 4(d) at least once every two years, any suspected discrimination or preference in rate is traditionally abided until the next rate filing, at which time—at least until the decision below—the pipeline was required by the language of Section 4(e) and the Commission's Regulations to prove that its rates were non-discriminatory and non-preferential; this normally required a demonstration that each class of customers was paying its fair share—but no more—of total system costs. See *F.P.C.* v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. at 642-45; *F.P.C.* v. *Tennessee Gas Transmission Co.*, *supra*, 371 U.S. at 152-53. Moreover, although hearing and decision on the Section 4(b) issue

might require an extended period of time,[10] parties subject to discrimination under the increased rates would not face irrevocable injury from delays in hearing and decision, since the Commission has power under Section 4 to require refunds of the excess collections from the time the increased rates became effective, *F.P.C.* v. *Tennessee Gas Transmission Co., supra*, 371 U.S. at 152-53; *Kansas-Nebraska Natural Gas Co.* v. *F.P.C.*, 534 F.2d 227 at 232 (10th Cir. 1976).

The court of appeals' decision—without suggesting any valid countervailing reason—would bar use of a Section 4(e) proceeding to eliminate discrimination, except where the discrimination was a "novel feature" of the increased rate filing; under the court's decision, existing discrimination, whether long-continued or of recent origin, would be given a preferred, protected, and practically impregnable position. Discrimination and preference, once having worked their way into a pipeline's tariff, could be removed only via a Section 5 proceeding, in which the burden of proof would be on the Commission, and relief would be prospective only, giving the parties enjoying a preference every incentive to delay decision, and assuring that the proceeding would be "nigh interminable", *Atlantic Refining Co.* v. *Public Service Commission, supra*, 360 U.S. at 389. These are the very factors that have led this Court to recognize the inadequacy of the Section 5 remedy and to find, consistent with the broad remedial purposes of the Natural Gas Act, that the Commission does indeed possess effective means to carry out the mandates of Section 4(a) and 4(b), *F.P.C.* v. *Louisiana Power & Light Co., supra* (use of Section 4(e) procedure approved); *Atlantic Refining Co.* v. *Public Service*

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[10] In the instant proceeding, the pipeline's increased rates were filed July 30, 1976, and the Commission's order, finding those rates discriminatory and requiring nondiscriminatory rates, issued August 6, 1979—a time lapse of three years.

Commission, supra (use of Section 7 conditioning power approved); see also *Permian Basin Area Rate Cases, supra*, 390 U.S. at 776.

The sole justification tendered by the court of appeals for thus stripping from the Act the sole meaningful remedy for discriminatory rates is the need to give weight to the *status quo*. But that is not a factor specified for protection by the statute; it is not a value that the agency charged with administering the statute has found should be preferred to the detriment of the values specifically sought to be protected by the statute; and it serves, at least in this instance, to give to past practice, no matter how arrived at, a stultifying "dead hand" power over the present that is totally inconsistent with the statute.

The decision below would be troubling enough if the validity of the existing allocation it was reinstating had previously been the subject of litigation before, and been found reasonable by, the Commission; the court's result would, however mistakenly, be analogous to the invocation of *res judicata* or *stare decisis*. But in the instant case, the 1962 differentials were not the product, even in 1962, of hearing and decision on the merits. Rather, those differentials were the product of a settlement, arrived at to avoid decision on the merits, explicitly containing (as rate settlements before the Commission typically do) a provision that the parties would not be bound in any other proceeding by the result reached or the methods (if any) supposed to underlie the result, and approved by a Commission order providing (27 FPC 187 at 190):

> "In issuing this order, the Commission's action is not to be construed as a concurrence with the cost of service determinations, allocation methods and rate design principles used in arriving at rates and charges for future sales, or in computing the

> amount of refunds agreed upon in the settlement agreement, and neither the Commission, its Staff, or other parties to the proceedings are to be prejudiced or bound thereby in future proceedings."

Ever since the passage of the Natural Gas Act in 1938, the majority of pipeline rate-increase cases has been disposed of by settlement rather than by hearing and decision on the merits; and even those cases that do go through the decisional process normally do so on a few limited issues, with the remainder disposed of through settlement. A key factor in the settlement program is that a settlement neither resolves, nor prejudices ultimate resolution of, recurrent issues, which may be tried when the pipeline files its next increase; settlement is encouraged by the fact that the parties need only evaluate the impact on them of the settlement during the period the settlement rates will be in effect, and are free to challenge any issue, without prejudice from their agreement to settle, when the pipeline files its next increase.

By insulating "those portions of [a rate-increase] filing that represent no departure from the status quo"—including the results of a prior settlement—from the normal Section 4 burden-of-proof provisions heretofore uniformly assumed to apply to the entire increased rate, the decision below will seriously complicate the settlement process. Parties otherwise willing to agree to a given dollar result, or a given resolution of a particular issue, because such resolution has little impact on the rates being settled will, under the court of appeals' decision, be forced to speculate as to the potential impact of applying the same resolution in different circumstances years in the future, and to oppose settlement because of its possible impact in resolution of the next case. And if it is argued that the decision of the court below "merely" shifts the burden of proof, the argument is

tenuous indeed: Every experienced practitioner knows that, as a practical matter, assignment of the burden of proof, though seemingly procedural, will frequently determine the ultimate outcome on the merits. So, here, the court of appeals' holding that the burden on the zone allocation issue was on the Commission rather than on the pipeline effectively determined the result, and reimposes the 1962 differentials in lieu of the Mcf-mile allocations found just and reasonable by the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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